

FutureCeuticals' COFFEEBERRY® products have commanded a great deal of media attention and interest, and are in very high demand, making the products and the brand target of unlawful imitation, mistake, and deception.

3. FutureCeuticals has specifically licensed the use of its COFFEEBERRY® trademark to licensees in a number of fields, including the personal care products and the cosmetics fields, such that the COFFEEBERRY® mark appears in advertising and on packaging and containers for skin care products containing COFFEEBERRY® extract. Attached hereto as Exhibit A is a true and correct copy of a photograph of REVALÉSKIN® and attached hereto as Exhibit B is a page from the internet of a photograph of PRIORI®, both containing COFFEEBERRY® extract and specifically licensed by Plaintiff FutureCeuticals.

4. Defendant Australian Gold is selling Wicked Lovely dark tanning DermaDark Bronzing Blend ("Wicked Lovely Product") as having "Coffee Berry" Extract and having one of nature's most potent antioxidants, in direct competition with FutureCeuticals' licensees, knowingly infringing upon Plaintiff FutureCeuticals' COFFEEBERRY® trademark. Indeed, Defendant Australian Gold has continued to use this infringing mark despite Defendant Australian Gold's actual notice of Plaintiff FutureCeuticals' federal trademark registrations and exclusive rights in the COFFEEBERRY® trademark.

5. In addition to using Plaintiff FutureCeuticals' COFFEEBERRY® trademark without authorization or permission, Defendant Australian Gold uses false and misleading advertising and labeling in an unlawful attempt to ride the success of Plaintiff

FutureCeuticals' patented technology, rich source of antioxidants, and the federally-registered COFFEEBERRY® brand. Defendant Australian Gold's advertising and its product packaging misrepresents that the skin care product it calls Wicked Lovely contains "Coffee Berry" Extract. Specifically, it states that:

- a. "Take a walk on the wild side with the unique blend of powerful *DermaDark* bronzers infused with "coffee berry" extract to deliver flawless, radiant color;"
- b. "Coffee Berry" Extract – One of nature's most potent antioxidants to help fight fine lines and wrinkles;" and
- c. Under "INGREDIENTS: Coffea Arabica Berry ('Coffeeberry') . . ."

6. Defendant Australian Gold's continuing use of the "Coffee Berry" and "Coffeeberry" marks, as well as the continued misrepresentations in advertising and labeling have caused, and will continue to cause, confusion, or mistake, or deception as to the affiliation, connection, or association of Defendant Australian Gold with Plaintiff FutureCeuticals, or as to the origin, source, sponsorship, or approval of Defendant Australian Gold's product by Plaintiff FutureCeuticals.

7. By using "Coffee Berry" and "Coffeeberry" on its products, without the permission of Plaintiff FutureCeuticals, Defendant Australian Gold is wrongfully trading on the significant goodwill and commercial success of Plaintiff FutureCeuticals' COFFEEBERRY® brand and trademark.

8. Plaintiff FutureCeuticals brings this action for trademark infringement, unfair competition, false advertising, consumer fraud, and deceptive trade practices under the United States Lanham Act, 15 U.S.C. § 1050, et seq., and under Minnesota law.

9. Plaintiff FutureCeuticals asks this Court to stop Defendant Australian Gold from its wrongful and illegal conduct in using the "Coffee Berry" and "Coffeeberry" marks and its false and misleading advertising, and to recover damages, attorneys' fees and costs.

PARTIES

10. Plaintiff FutureCeuticals is an organic farming, product innovation, development, manufacturing and biotechnology corporation that manufactures and develops scientifically innovative nutraceutical-, functional food- and cosmetic-based ingredients.

11. FutureCeuticals is duly organized and existing under the laws of the State of Illinois with corporate address at 300 West Sixth Street, Momence, IL 60954, and a principal place of business at 2692 N. State Rt. 1-17, Momence, Illinois 60954.

12. Upon information and belief, Defendant Australian Gold is a company that sells lotions and tanning products.

13. Upon information and belief, Defendant Australian Gold is a corporation duly organized and existing under the laws of the State of Indiana with its principal place of business at 6270 Corporate Drive in Indianapolis, Indiana 46278.

JURISDICTION AND VENUE

14. This Court has subject matter jurisdiction over the claims asserted in this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338. Plaintiff FutureCeuticals has asserted claims under the Lanham Act, 15 U.S.C. § 1051, *et seq.*

15. This Court has jurisdiction over the related state law claims pursuant to 28 U.S.C. § 1332(a)(1), as the value of the damages, injunction and other relief requested (exclusive of costs and interest) exceeds \$75,000, and under 28 U.S.C. § 1367. Specifically, Plaintiff FutureCeuticals has asserted state law claims under Minn. Stat. § §325D.44, 325F.67, 325F.69 (2010), and Minnesota common law.

16. This Court has personal jurisdiction over Defendant Australian Gold pursuant to Fed. R. Civ. P. 4(k)(1)(A) and Minn. Stat. § 543.19 subd. 2 (2010), because Defendant Australian Gold sells and has sold its products that display the infringing trademark in the State of Minnesota.

17. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because, upon information and belief, Defendant Australian Gold's conduct that forms the basis of Plaintiff FutureCeuticals' claims occurred, in part, in this judicial district.

FACTUAL BACKGROUND

18. Plaintiff FutureCeuticals is a vertically integrated grower, developer, manufacturer, processor, and marketer of innovative nutraceuticals, functional foods, and cosmetic ingredients, and has developed and marketed an extensive line of probiotic, nutritional supplement, food-based antioxidant, soy isoflavone, and beverage ingredients.

19. One of Plaintiff FutureCeuticals' innovative products is the COFFEEBERRY® brand line of ingredients and underlying technologies for cosmetics, skin care preparations, food, beverages, nutritional supplements and other consumer products. FutureCeuticals' COFFEEBERRY® branded ingredients are offered as a whole powder, a water-soluble concentrate, water- and ethanol-based extracts, or whole

granules, and they are produced through patented processes that create the world's only product line of ingestible and topical materials using the whole coffee fruit of the coffee plant that contains the seeds (or beans) and the surrounding pulp, mucilage and husk, or certain portions thereof.

20. Until the invention of Plaintiff FutureCeuticals' novel methods and products, only the seed or bean of the coffee plant was harvested because the fruit was considered an industrial waste, too perishable to process and consequently unsuitable for human use. In contrast, FutureCeuticals' innovative and patented coffee fruit material is safe and suitable for human use.

21. Plaintiff FutureCeuticals is the owner of the following federal trademark registrations for the distinctive and coined trademark COFFEEBERRY® in connection with products intended for the human body:

- U.S. Reg. No: 3,163,412, COFFEEBERRY and Design for "Nutriceuticals for use as a dietary supplement and as a dietary supplement ingredient" in International Class 5;
- U.S. Reg. No. 3,165,945, COFFEEBERRY for "Nutriceuticals for use as a dietary supplement and as a dietary supplement ingredient" in International Class 5;
- U.S. Reg. No. 3,155,230, COFFEEBERRY and Design for "Nutriceuticals for use as a dietary supplement and as a dietary supplement ingredient" in International Class 5;
- U.S. Reg. No. 3,155,231, COFFEEBERRY and Design for "Food and beverage ingredients, namely, whole processed coffee fruit" in International Class 29;
- U.S. Reg. No. 3,155,232, COFFEEBERRY for "Food and beverage ingredients, namely, whole processed coffee fruit" in International Class 29;

- U.S. Reg. No. 3,420,510, COFFEEBERRY for “Cosmetics; body and beauty care cosmetics; and whole coffee fruit and extracts of whole coffee fruit sold as component ingredients of cosmetics and non-medicated beauty and skin care preparations” in International Class 3;
- U.S. Reg. No. 3,260,267, COFFEEBERRY FORTE for “Nutriceuticals for use as a dietary supplement and as a dietary supplement ingredient” in International Class 5;
- U.S. Reg. No. 3,646,701, COFFEEBERRY for “Antioxidants used in the manufacture of cosmetics, beverages, food products and food supplements” in International Class 3; and
- U.S. Reg. No. 3,643,304, COFFEEBERRY for “Food supplements, namely, anti-oxidants” in International Class 5. Attached hereto as Exhibit C are true and correct copies of the Registration Certificates listed above.

22. Plaintiff FutureCeuticals’ first use date for its well-known COFFEEBERRY® trademark is August 1, 2005 (more than five years ago).

23. Plaintiff FutureCeuticals’ COFFEEBERRY® Whole Coffee Fruit Products are covered by the following patents: US 7,754,263; US 7,807,205; and US 7,815,959, and continuation applications are currently pending.

24. Plaintiff FutureCeuticals also owns many COFFEEBERRY® domain names including, but not limited to <coffeeberry.com>, <coffeeberry.org>, <coffeeberry.net>, <amazingcoffeeberry.com>, <coffeeberryradiance.com>, <coffeeberry-skincare.com>, <coffeeberryantioxidant.net>, <coffeeberryskin.net>, <coffeeberryblends.com>, <coffeeberryextract.com>, <coffeeberrysecret.com>, <coffeeberryskin.com>, and <www-coffeeberry.com> domains, which direct internet users to a website that prominently displays its COFFEEBERRY® trademark and

promotes FutureCeuticals' various COFFEEBERRY® brand products. Attached hereto as Exhibit D are true and correct copies of excerpts from FutureCeuticals' COFFEEBERRY® Internet Web site.

25. In addition to the extraordinary attention the COFFEEBERRY® product has received, Plaintiff FutureCeuticals and its licensees have spent considerable time and expense on packaging and advertising its COFFEEBERRY® brand, especially in the skin preparation, cosmetic, food, beverage and nutrition industries. Plaintiff FutureCeuticals' COFFEEBERRY® brand is far reaching. Accordingly, the consuming public knows Plaintiff FutureCeuticals as the source of goods bearing the COFFEEBERRY® trademark.

26. Plaintiff FutureCeuticals has specifically licensed the use of its COFFEEBERRY® mark on finished consumer products such as lotions, cosmetics, foods, beverages and dietary supplements. For example, as discussed above, VDF licensees sell the popular and well known PRIORI® and REVALÉSKIN® products that both feature COFFEEBERRY®. See Exhibits A & B. Moreover, attached hereto as Exhibit E is a true and correct copy of the packaging of licensee New Chapter's COFFEEBERRY® product and attached hereto as Exhibit F is a true and correct copy of the packaging for Abundance that both contain the dietary supplement COFFEEBERRY® Whole Coffee Fruit Concentrate.

27. Defendant Australian Gold's advertising and its product packaging misrepresents that the skin care product it calls Wicked Lovely contains "Coffee Berry" Extract. Specifically, it states that:

- a. "Take a walk on the wild side with the unique blend of powerful *DermaDark* bronzers infused with "coffee berry" extract to deliver flawless, radiant color;".
- b. "Coffee Berry" Extract – One of nature's most potent antioxidants to help fight fine lines and wrinkles;" and
- c. Under "INGREDIENTS: Coffea Arabica Berry ('Coffeeberry') . . ." Attached hereto as Exhibit G are photographs of the back side of the Wicked Lovely product.

28. Defendant Australian Gold's Wicked Lovely Product are displayed on numerous websites on the internet. Attached hereto as Exhibit H are a few examples of such websites.

29. Many websites where consumers can purchase Australian Gold's Wicked Lovely Products also contain the legitimate PRIORI®, REVALÉSKIN® and/or New Chapter products that actually contain COFFEEBERRY® and are licensed to use the trademark and brand. Attached hereto as Exhibit I are a few examples of such websites.

30. Australian Gold's unauthorized use of "Coffee Berry," "coffee berry," and "Coffeeberry" is almost identical to Plaintiff FutureCeutical's COFFEEBERRY® trademark.

31. The product sold by Defendant Australian Gold that displays the unauthorized "Coffee Berry" and "Coffeeberry" marks are similar to and competitive with products sold by Plaintiff FutureCeuticals and its licensees.

32. The unauthorized use of "Coffee Berry" and "Coffeeberry" on its Wicked Lovely Products and in its advertising misrepresents and falsely communicates to consumers that Defendant Australian Gold's products include the essence of the whole

fruit from the coffee plant, when, in fact, the product only contains the seed or bean from the coffee plant.

33. The whole fruit from the coffee plant (containing the intact seed) is materially different than the seed or bean that has been removed from the whole fruit of the coffee plant. Indeed, the chemical qualities of coffee seeds significantly differs from the whole coffee fruit and FutureCeuticals' COFFEEBERRY® products.

34. On or around September 22, 2010, Plaintiff FutureCeuticals sent a letter to Defendant Australian Gold demanding, among other things, that Defendant Australian Gold cease and desist from using "Coffee Berry," "Coffeeberry," and "Coffee Berry Extract" as a trademark and ingredient designation.

35. In the letter, Plaintiff FutureCeuticals also informed Defendant Australian Gold that third party websites displayed and advertised Australian Gold's Wicked Lovely Products with "Coffee Berry," "Coffeeberry," and "coffee berry," and that such trademark infringement and false and misleading advertisements must cease.

36. On or around October 15, 2010, Plaintiff FutureCeuticals sent another warning letter to Defendant Australian Gold.

37. Defendant Australian Gold has failed to cease its unauthorized, false, and misleading use of "Coffee Berry," "Coffeeberry," and "coffee berry" on product containers and elsewhere in advertising.

38. Defendant Australian Gold has continued to use the false, misleading, and confusingly similar "Coffee Berry," "Coffeeberry," and "coffee berry" marks and

continues to make false and misleading statements about its products after receiving this actual notice of Plaintiff FutureCeuticals' superior rights and legitimate objections.

39. Plaintiff FutureCeuticals has been harmed by, and will continue to be harmed if, Defendant Australian Gold's unfair and deceptive conduct is not enjoined, and if corrective advertising is not ordered. Due to Defendant Australian Gold's willful infringement, false and misleading advertising, Plaintiff FutureCeuticals is entitled to actual damages, including Defendant Australian Gold's profits from the infringement and attorneys' fees and costs.

COUNT I - TRADEMARK INFRINGEMENT
(Lanham Act § 32, 15 U.S.C. § 1114 (2009 & Supp. 2010))

40. Plaintiff FutureCeuticals restates and incorporates by reference the allegations in Paragraphs 1-39.

41. Plaintiff FutureCeuticals is and has been the owner of United States Trademark Registration No. 3,420,510 for the mark COFFEEBERRY® in connection with "Cosmetics; body and beauty care cosmetics; and whole coffee fruit and extracts of whole coffee fruit sold as component ingredients of cosmetics and non-medicated beauty and skin care preparations" since its registration on the Principal Register on April 29, 2008.

42. Plaintiff's United States Trademark Registration No. 3,420,510 for the mark COFFEEBERRY® is valid and legally protectable.

43. Plaintiff FutureCeuticals is and has been the owner of United States Trademark Registration No. 3,155,230 for the mark COFFEEBERRY & Design® in

connection with "Nutriceuticals for use as a dietary supplement and as a dietary supplement ingredient" since its registration on the Principal Register on October 10, 2006.

44. Plaintiff's United States Trademark Registration No. 3,155,230 for the mark COFFEEBERRY & Design[®] is valid and legally protectable.

45. Plaintiff FutureCeuticals is and has been the owner of United States Trademark Registration No. 3,155,231 for the mark COFFEEBERRY & Design[®] in connection with "Food and beverage ingredients, namely, whole processed coffee fruit" since its registration on the Principal Register on October 10, 2006.

46. Plaintiff's United States Trademark Registration No. 3,155,231 for the mark COFFEEBERRY & Design[®] is valid and legally protectable.

47. Plaintiff FutureCeuticals is and has been the owner of United States Trademark Registration No. 3,155,232 for the mark COFFEEBERRY[®] in connection with "Food and beverage ingredients, namely, whole processed coffee fruit" since its registration on the Principal Register on October 10, 2006.

48. Plaintiff's United States Trademark Registration No. 3,155,232 for the mark COFFEEBERRY[®] is valid and legally protectable.

49. Plaintiff FutureCeuticals is and has been the owner of United States Trademark Registration No. 3,163,412 for the mark COFFEEBERRY and Design[®] in connection with "Nutriceuticals for use as a dietary supplement and as a dietary supplement ingredient" since its registration on the Principal Register on October 24, 2006.

50. Plaintiff's United States Trademark Registration No. 3,163,412 for the mark COFFEEBERRY and Design® is valid and legally protectable.

51. Plaintiff FutureCeuticals is and has been the owner of United States Trademark Registration No. 3,165,945 for the mark COFFEEBERRY® in connection with "Nutriceuticals for use as a dietary supplement and as a dietary supplement ingredient" since its registration on the Principal Register on October 31, 2006.

52. Plaintiff's United States Trademark Registration No. 3,165,945 for the mark COFFEEBERRY® is valid and legally protectable.

53. Plaintiff FutureCeuticals is and has been the owner of United States Trademark Registration No. 3,260,267 for the mark COFFEEBERRY FORTE® in connection with "Nutriceuticals for use as a dietary supplement and as a dietary supplement ingredient" since its registration on the Principal Register on October 17, 2006.

54. Plaintiff's United States Trademark Registration No. 3,260,267 for the mark COFFEEBERRY FORTE® is valid and legally protectable.

55. Plaintiff FutureCeuticals is and has been the owner of United States Trademark Registration No. 3,646,701 for the mark COFFEEBERRY® in connection with "Antioxidants used in the manufacture of cosmetics, beverages, food products and food supplements" since its registration on the Principal Register on June 30, 2009.

56. Plaintiff's United States Trademark Registration No. 3,646,701 for the mark COFFEEBERRY® is valid and legally protectable.

57. Plaintiff FutureCeuticals is and has been the owner of United States Trademark Registration No. 3,643,304 for the mark COFFEEBERRY® in connection with "Food supplements, namely, anti-oxidants" since its registration on the Principal Register on June 30, 2009.

58. Plaintiff's United States Trademark Registration No. 3,643,304 for the mark COFFEEBERRY® is valid and legally protectable.

59. Defendant Australian Gold's products are related to, similar to, and competitive with the skin care products of Plaintiff FutureCeuticals' licensees.

60. Plaintiff FutureCeuticals and its licensees have expended considerable time, effort, and expense to promote, advertise, and popularize FutureCeuticals' COFFEEBERRY® brand of products, as well as the products offered by its licensees in connection with its COFFEEBERRY® mark. This mark is distinctive and well-known. Accordingly, the purchasing public has come to know, rely upon, and recognize Plaintiff FutureCeuticals as the source of products bearing the COFFEEBERRY® mark. Plaintiff FutureCeuticals has established valuable goodwill in the COFFEEBERRY® mark.

61. Notwithstanding Plaintiff FutureCeuticals' well-known, prior common law and statutory rights in the COFFEEBERRY® mark, Defendant Australian Gold adopted, used, and is continuing to use the confusingly similar "Coffee Berry" and "coffee berry" marks, or has knowingly contributed to the adoption, use, and continuing use of the infringing "Coffee Berry," "coffee berry," and "Coffeeberry" marks, with actual or constructive knowledge of Plaintiff FutureCeuticals' prior use and registration of the COFFEEBERRY® mark and brand.

62. Defendant Australian Gold continues to use, or knowingly contributes to the use of, the false, misleading, and confusingly similar "Coffee Berry," "Coffeeberry" and "Coffee Berry Extract" marks with the intent to confuse and deceive consumers and to unjustly enrich Defendant Australian Gold at the expense of the public and Plaintiff FutureCeuticals.

63. Defendant Australian Gold has continued to use the infringing "Coffee Berry," "Coffeeberry," and "Coffee Berry Extract" marks despite Defendant Australian Gold's actual notice of Plaintiff FutureCeuticals' registrations and receiving cease and desist letters from Plaintiff FutureCeuticals.

64. Defendant Australian Gold's use of the "Coffee Berry," "Coffeeberry," and "Coffee Berry Extract" marks is without license, approval, or consent of Plaintiff FutureCeuticals. As a result, Plaintiff FutureCeuticals is unable to control the nature and quality of the product offered by Defendant Australian Gold under the infringing "Coffee Berry," "Coffeeberry," and "Coffee Berry Extract" names and marks.

65. Defendant Australian Gold's use of the "Coffee Berry," "Coffeeberry," and "Coffee Berry Extract" marks is likely to cause confusion, cause mistake, and deceive as to the affiliation, connection, or association of Defendant Australian Gold with Plaintiff FutureCeuticals as to the origin, sponsorship, or approval of Defendant Australian Gold's product by Plaintiff FutureCeuticals. This unauthorized use of the "Coffee Berry," "Coffeeberry," and "coffee berry" marks constitutes trademark infringement under 15 U.S.C. § 1114.

66. Defendant Australian Gold's unlawful actions have caused, and will continue to cause, Plaintiff FutureCeuticals irreparable harm unless enjoined.

67. Defendant Australian Gold has profited from its unlawful actions and has been unjustly enriched to the detriment of Plaintiff FutureCeuticals. Defendant Australian Gold's unlawful actions have caused Plaintiff FutureCeuticals monetary damage.

68. Plaintiff FutureCeuticals has been damaged by Defendant Australian Gold's unfair competition and is entitled to injunctive relief pursuant to 15 U.S.C. §§ 1116.

69. Pursuant to 15 U.S.C. § 1117, Plaintiff FutureCeuticals is entitled to recover all of Defendant Australian Gold's profits, Plaintiff FutureCeuticals' damages, as well as the costs of this action. The intentional nature of Defendant Australian Gold's unlawful acts renders this an "exceptional case," entitling Plaintiff FutureCeuticals to enhanced damages and an award of attorneys' fees under 15 U.S.C. § 1117(a).

COUNT II - FEDERAL UNFAIR COMPETITION
(Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2009 & Supp. 2010))

70. Plaintiff FutureCeuticals restates and incorporates by reference the allegations in Paragraphs 1-69.

71. Plaintiff FutureCeuticals has used the COFFEEBERRY® mark in interstate commerce in connection with the products described above.

72. Plaintiff FutureCeuticals' COFFEEBERRY® mark is distinctive and consumers have come to associate the products branded with the COFFEEBERRY® mark as emanating from Plaintiff FutureCeuticals.

73. Defendant Australian Gold's use of "Coffee Berry," "Coffeeberry," and "coffee berry" is a false designation of origin, false and misleading descriptions of fact, and false and misleading representations of fact.

74. Defendant Australian Gold's use of "Coffee Berry," "Coffeeberry," and "coffee berry" has caused, and is likely to continue to cause, confusion or mistake, or to deceive as to the affiliation, connection, or association of Defendant Australian Gold with Plaintiff FutureCeuticals, or as to the origin, sponsorship, or approval of Australian Gold's products by Plaintiff FutureCeuticals, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

75. Defendant Australian Gold's unlawful actions have caused, and will continue to cause, Plaintiff FutureCeuticals irreparable harm unless enjoined.

76. Defendant Australian Gold has willfully undertaken the activities above and willfully intended to trade upon the goodwill of Plaintiff.

77. Defendant Australian Gold has profited from its unlawful actions and has been unjustly enriched to the detriment of Plaintiff FutureCeuticals.

78. Plaintiff FutureCeuticals has been damaged by Defendant Australian Gold's unfair competition and is entitled to injunctive relief pursuant to 15 U.S.C. §§ 1116.

79. Pursuant to 15 U.S.C. § 1117, Plaintiff FutureCeuticals is entitled to recover all of Defendant Australian Gold's profits, Plaintiff FutureCeuticals' damages, as well as the costs of this action. The intentional nature of Defendant Australian Gold's unlawful acts renders this an "exceptional case," entitling Plaintiff FutureCeuticals to enhanced damages and an award of attorneys' fees under 15 U.S.C. § 1117(a).

COUNT III – FALSE ADVERTISING
(Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2009 & Supp. 2010))

80. Plaintiff FutureCeuticals restates and incorporates by reference the allegations in Paragraphs 1-79.

81. In commercial advertising and labeling of its products, Defendant Australian Gold has made material representations that are false and misleading, including, but not limited to:

- a. "Take a walk on the wild side with the unique blend of powerful *DermaDark* bronzers infused with "coffee berry" extract to deliver flawless, radiant color;"
- b. "Coffee Berry" Extract – One of nature's most potent antioxidants to help fight fine lines and wrinkles;" and
- c. Under "INGREDIENTS: Coffea Arabica Berry ('Coffeeberry') . . ."
See Exhibit G.

82. Defendant Australian Gold's statements that are literally false and false by implication have actually deceived or have the capacity to deceive a substantial segment of the target markets for Defendant Australian Gold's products and the products produced or licensed by Plaintiff FutureCeuticals.

83. In addition, Defendant Australian Gold's statements that are literally false and false by implication have actually deceived or have the capacity to deceive Plaintiff FutureCeuticals' licensees.

84. Defendant Australian Gold's false, deceptive and/or misleading statements will cause deception and/or confusion that is likely to influence the prospective customer's decision to purchase Defendant Australian Gold's products.

85. Based on Defendant Australian Gold's statements that are either literally false or false by implication, Plaintiff FutureCeuticals has been or will likely be injured as a result.

86. As such, Defendant Australian Gold's actions constitute false advertising pursuant to § 43(a)(1)(B) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B).

87. Defendant Australian Gold must therefore be enjoined from making any further false statement in its advertising and product labels, and must be ordered to publish corrective advertising.

88. Defendant Australian Gold's false advertising has caused damages to Plaintiff FutureCeuticals, including, but not limited to, the need for corrective advertising.

89. Plaintiff FutureCeuticals has been damaged by Defendant Australian Gold's false advertising and is entitled to injunctive relief pursuant to 15 U.S.C. § 1116.

90. Pursuant to 15 U.S.C. § 1117, Plaintiff FutureCeuticals is entitled to recover all of Australian Gold's profits, Plaintiff FutureCeuticals' damages, as well as the costs of this action. The intentional nature of Defendant Australian Gold's unlawful acts renders

this an "exceptional case," entitling Plaintiff FutureCeuticals to enhanced damages and an award of attorneys' fees under 15 U.S.C. § 1117(a).

COUNT IV - DECEPTIVE TRADE PRACTICES
(Minn. Stat. § 325D.44 (2010))

91. Plaintiff FutureCeuticals restates and incorporates by reference the allegations in Paragraphs 1-90.

92. Plaintiff FutureCeuticals is the owner of United States Trademark Registration Nos. 3,155,232; 3,155,231; 3,155,230; 3,165,945; 3,163,412; 3,420,510; 3,260,267; 3,646,701; and 3,643,304 for the trademark COFFEEBERRY®.

93. Defendant Australian Gold's adoption and use of the "Coffee Berry," "Coffeeberry," and "coffee berry" trademarks is an attempt to pass off its product as Plaintiff FutureCeuticals' product, and has caused, and will continue to cause, a likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of Defendant Australian Gold's products.

94. Pursuant to Minnesota Statute § 325D.45, Plaintiff FutureCeuticals is entitled to an injunction and attorneys' fees.

COUNT V – FALSE ADVERTISING
(Minn. Stat. § 325F.67 (2010))

95. Plaintiff FutureCeuticals restates and incorporates by reference the allegations in Paragraphs 1-94.

96. Upon information and belief, Defendant Australian Gold intended to sell and has sold its products in the State of Minnesota.

97. Upon information and belief, Defendant Australian Gold disseminated its products' labels and advertisements to the public in the State of Minnesota.

98. Defendant Australian Gold's product labels and advertisements includes the trademarks "Coffee Berry," "Coffeeberry," and "coffee berry" and the following statements:

- a. "Take a walk on the wild side with the unique blend of powerful *DermaDark* bronzers infused with "coffee berry" extract to deliver flawless, radiant color;"
- b. "Coffee Berry" Extract – One of nature's most potent antioxidants to help fight fine lines and wrinkles;" and
- c. Under "INGREDIENTS: Coffea Arabica Berry ('Coffeeberry') . . ." See Exhibit G.

99. Defendant Australian Gold's statements about its products are false and misleading because the ingredients of Defendant Australian Gold's products contain only the extract from the coffee seed, not the whole fruit of the coffee plant.

100. Pursuant to Minnesota Statute § 8.31 subd. 3a (2008), Plaintiff FutureCeuticals is entitled to an injunction, attorneys' fees, lost profits, and special damages.

COUNT VI – CONSUMER FRAUD
(Minn. Stat. § 325F.69 (2008))

101. Plaintiff FutureCeuticals restates and incorporates by reference the allegations in Paragraphs 1-100.

102. Defendant Australian Gold's product labels and advertisements includes the trademarks "Coffee Berry," "Coffeeberry," and "coffee berry" and the following statements:

- a. "Take a walk on the wild side with the unique blend of powerful *DermaDark* bronzers infused with "coffee berry" extract to deliver flawless, radiant color;"
- b. "Coffee Berry" Extract – One of nature's most potent antioxidants to help fight fine lines and wrinkles;" and
- c. Under "INGREDIENTS: Coffea Arabica Berry ('Coffeeberry') . . ." See Exhibit G.

103. Defendant Australian Gold's statements about its products are false and misleading because the ingredients of Defendant Australian Gold's products contain only the extract from the coffee seed, not the whole fruit of the coffee plant.

104. Defendant Australian Gold intended that others rely on its false and misleading statements in connection with the sale of its products.

105. Pursuant to Minnesota Statute § 8.31 subd. 3a (2008), Plaintiff FutureCeuticals is entitled to an injunction, attorneys' fees, lost profits, and special damages.

COUNT VII - TRADEMARK INFRINGEMENT
(Minnesota Common Law)

106. Plaintiff FutureCeuticals restates and incorporates by reference the allegations in Paragraphs 1-105.

107. Defendant Australian Gold's adoption and use of the confusingly similar "Coffee Berry," "Coffeeberry," and "coffee berry" trademarks constitutes willful,

deliberate, and intentional trademark infringement in violation of the common law of the State of Minnesota.

108. Defendant Australian Gold's unlawful actions have caused, and will continue to cause, Plaintiff FutureCeuticals irreparable harm unless enjoined.

109. Defendant Australian Gold has profited from its unlawful actions and has been unjustly enriched to the detriment of Plaintiff FutureCeuticals.

110. Defendant Australian Gold's unlawful actions have caused Plaintiff FutureCeuticals monetary damage in an amount presently unknown, but in an amount to be determined at trial.

JURY TRIAL DEMANDED

111. Plaintiff FutureCeuticals demands a jury trial for all issues triable to a jury.

RELIEF REQUESTED

WHEREFORE, Plaintiff FutureCeuticals prays for a judgment in its favor and against Defendant Australian Gold ordering:

1. That Defendant Australian Gold, and each of its officers, directors, agents, servants, employees and representatives, and those persons acting in active concert or participation with them or any of them, be permanently enjoined and restrained from:

a) Using on or in connection with the production, manufacture, advertisement, promotion, displaying for sale (including on the internet), offering for sale, sale, or distribution of any articles of merchandise, or for any purposes whatsoever, the designation or mark COFFEE BERRY in a context indicative of Plaintiff FutureCeuticals or its COFFEEBERRY® products, or of any skin preparations, cosmetics, nutraceuticals, dietary supplements, or on any product or service reasonably related thereto;

b) Representing by any means whatsoever, directly or indirectly, or taking any act calculated likely to cause confusion, mistake or deceive consumers into believing the Defendant Australian Gold's product originated with or are the products of Plaintiff FutureCeuticals, or that there is any affiliation or connection between Plaintiff FutureCeuticals and Defendant Australian Gold or its products and from otherwise unfairly competing with Plaintiff FutureCeuticals including using for any purposes whatsoever, the mark "Coffee Berry," "coffee berry," and "Coffeeberry" or any similar variation; and

c) Representing that Defendant Australian Gold's Wicked Lovely Products, or any related products, contain the whole fruit of the coffee bush.

2. That Australian Gold, at its own expense, be required to recall and destroy all merchandise, marketing materials, advertisements, flyers, brochures, displays, demos, or any other materials advertising, displaying, or promoting Defendant Australian Gold's Wicked Lovely Products with "Coffee Berry," "Coffeeberry," and "coffee berry" or any similar variation, or including any claim that any of Defendant Australian Gold's products contain the whole fruit of the coffee plant;

3. That Defendant Australian Gold be required to edit any websites that incorporate any mark or design with "Coffee Berry," "coffee berry," and "Coffeeberry" or any similar variation not in conformance with Section 1(a) above and to notify all third-party Web sites to remove any and all references to "Coffee Berry," "Coffeeberry," and "coffee berry";

4. That Defendant Australian Gold be required to deliver to FutureCeuticals' attorneys or representatives for destruction all labels, signs, prints, packages, molds, plates, dies, wrappers, receptacles, and advertisements in its possession or under its control, bearing the "Coffee Berry," "Coffeeberry," and "coffee berry" designations;

5. That Defendant Australian Gold be required to issue corrective advertising to all customers ordering its Wicked Lovely Products, or any other product Defendant Australian Gold has claimed contains the whole fruit of the coffee bush to inform them that the products do not contain this ingredient, and to correct the literally false and false by implication statements set forth above;

6. That Defendant Australian Gold provide an accounting of profits and sales of all Wicked Lovely Products advertised as having "Coffee Berry," "Coffeeberry," and "coffee berry;"

7. That Defendant Australian Gold pay to Plaintiff FutureCeuticals three times Plaintiff FutureCeuticals' losses, or Defendant Australian Gold's profits attributable to trademark infringement, whichever is higher;

8. That Defendant Australian Gold pay Plaintiff FutureCeuticals' reasonable investigation fees, litigation costs, and attorneys' fees; and

9. Any other relief the Court deems just and necessary.

Dated: April 6, 2011

s/Tiffany A. Blofield

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